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**Via RESS**

Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street, 27th Floor  
Toronto ON M4P 1E4

**Attention: Ms. Christine E. Long**  
**Registrar and Board Secretary**

Dear Ms. Long:

**Re: Notice of Motion to Review and Vary Phase 1 Decision and Order in EB-2018-0329**  
**dated February 27, 2020**  
**Ontario Energy Board File Number: EB-2020-0107**  
**Certarus Ltd. Submissions in Opposition to Motion**

1. Further to the Ontario Energy Board's ("OEB" or the "**Board**") Procedural Order No. 1 dated April 2, 2020, Certarus Ltd. ("**Certarus**") encloses the following submissions in opposition to the Notice of Motion to Review and Vary Phase 1 Decision and Order in EB-2018-0329 dated February 27, 2020 (the "**Decision**"), filed on behalf of Red Rock Indian Band ("**RRIB**") and Bingwi Neyaashi Anishinaabek Nation ("**BNA**"; together with the RRIB, the "**Movants**") (the "**Motion**").
2. The Decision addressed the Application of the Corporation of the Town of Marathon ("**Marathon**"), on its own behalf and as a representative of the Township of Manitouwadge, Township of Schreiber, Township of Terrace Bay and the Municipality of Wawa (together, the "**Municipalities**") for leave to construct the necessary natural gas pipelines systems, certificates of public convenience and necessity, approval of municipal franchise agreements, approval of land use agreements, approval of a Gas Supply Plan ("**GSP**"), and pre-approval of the cost consequences of a long-term liquefied natural gas ("**LNG**") supply contract (collectively, the "**Application**"). The OEB assigned the Application case number EB-2018-0329 (the "**Proceeding**").
3. Certarus is in receipt of the submissions of Marathon, RRIB, Nipigon LNG Corporation in its capacity as the general partner of Nipigon LNG LP ("**NLNG**") and Anwaatin Inc. ("**Anwaatin**") in support of the Motion and addresses the contents of those submissions herein

where appropriate. Submissions by the aforementioned parties that are not specifically addressed by this submission should not be interpreted as agreed to by Certarus.

## **I. BACKGROUND**

4. The Board has requested parties to address the "threshold question" outlined in Rule 43.01 of the OEB Rules of Practice and Procedure ("**Rules**") respecting "...whether the matter should be reviewed before conducting any review on the merits".<sup>1</sup>

5. The OEB has described the threshold test in a motion for review as follows:

The OEB threshold test associated with motions for review requires that the motion applicant identify grounds that raise a question as to the correctness of the decision and demonstrate that there is enough substance to the issues raised such that a review based on those issues could result in the OEB varying, cancelling or suspending the decision.<sup>2</sup> [emphasis added]

6. With respect, Certarus submits that the Motion falls far short of passing the threshold test warranting review.

### **A. The Motion**

7. Procedural Order No. 1 notes that the Motion challenges the OEB's decision with respect to the GSP, and the Board's "direction that the Applicant must provide a more detailed assessment of the CNG [compressed natural gas] option that takes into consideration use of CNG supply as the primary source of supply".<sup>3</sup> The Board further notes that the Motion asserts that this direction amounts to an error of fact that impacts the correctness of the Decision,<sup>4</sup> based on RRIB's assertion that that " Certarus had not meaningfully engaged, with RRIB and BNA in respect of the operation of its CNG facility on RRIB traditional territory."<sup>5</sup>
8. The Board requested parties to address whether the errors in fact alleged "are in fact errors of fact, and if there are errors of fact as alleged, whether these errors should result in the OEB varying its Phase 1 Decision."<sup>6</sup>
9. As more fully detailed below, in essence, the Motion is interlocutory, purporting to limit the scope of evidence the Board may consider in the course of determining the public interest over

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<sup>1</sup> Ontario Energy Board, Procedural Order No. 1, EB-2020-0107 (April 2, 2020) at page 3 [**EB 2020-0107 Procedural Order No. 1**].

<sup>2</sup> Ontario Energy Board, Review Decision and Order dated December 5, 2019, EB-2019-0180 at page 6, citing EB-2006-0322/0338/0340 Review Decision dated May 22, 2007 at page 18.

<sup>3</sup> EB 2020-0107 Procedural Order No. 1 at page 3.

<sup>4</sup> Red Rock Indian Band and Bingwi Neyaashi Anishinaabek First Nation, Notice of Motion to Review and Vary Phase 1 Decision and Order (March 18, 2020) at paras 21 [**Motion**].

<sup>5</sup> EB 2020-0107 Procedural Order No. 1 at paras 18 and 21.

<sup>6</sup> EB 2020-0107 Procedural Order No. 1 at page 3.

the two-Phase Proceeding designed to review the Application. As the Board noted in Procedural Order No. 1, no final decisions have been rendered.<sup>7</sup>

10. With respect, Certarus strongly disputes the RRIB assertion that "... it was not consulted by Certarus prior to the erection of Certarus' CNG facility" located near Red Rock, Ontario.<sup>8</sup> In any event, the Red Rock CNG Terminal is neither regulated by the Board, nor was it before the Board for approval in the Phase 1 proceeding.
11. Moreover, even if true, that alleged "fact" does not cure the deficiencies the Board identified on the face of the Application regarding Marathon's failure to adequately consider CNG as an alternative supply option, which was well within the Board's statutory authority to do.<sup>9</sup> The Red Rock CNG Terminal, now in operation, was not the sole CNG supply source identified on the record. The Municipalities near term and long term gas supply needs can be met from either of Certarus' existing Timmins or Red Rock CNG Terminals.
12. Accordingly, there is no basis to vary the Phase 1 Decision.

#### **B. The Facts**

13. The Applicant requested a two-phase approval process for its Application.<sup>10</sup> The requested Certificate was not issued pending consideration of technical capability and financial capacity and further evidence required to support economic feasibility:

However, the Project economics is an area of concern, and additional information or changes to the current proposal are required before any final approval can be granted. The outstanding issues will be addressed by the OEB in Phase 2.<sup>11</sup>

14. Even with respect to Certarus' request for CNG interconnection facilities, the Applicant asked the Commission to defer any decision until it could prepare and file a study in Phase 2 addressing the issue:

In its reply argument, the Applicant did not agree that it should be required to install CNG-related facilities in the absence of consideration by the OEB of a study that the Applicant intends to prepare and include in Phase 2 of the proceeding. The study would examine the feasibility of constructing and operating the facilities required to enable the Utility to take receipt of CNG

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<sup>7</sup> EB 2020-0107 Procedural Order No. 1 at page 3.

<sup>8</sup> Red Rock Indian Band and Bingwi Neyaashi Anishinaabek First Nation, Submissions on Motion to Review, EB-2020-0107 (April 17, 2020) at para 24 [**RRIB and BNA Submissions on Motion**].

<sup>9</sup> Ontario Energy Board, Decision and Order EB-2018-0329, Corporation of the Town of Marathon, Application for approval to construct a natural gas pipeline and associated facilities in the Town of Marathon, the Township of Manitouwadge, the Township of Schreiber, the Township of Terrace Bay and the Municipality of Wawa at page 5 [**Decision**].

<sup>10</sup> Decision, page 2; Town of Marathon, Argument-in-Chief, EB-2018-0329 (December 11, 2019) at paras 6-10; Application, Exhibit A, Tab 3, Schedule 1 at pages 5-6.

<sup>11</sup> Decision at page 5.

gas for use as a secondary source of system supply (*i.e.*, for peak sharing or emergency backup).<sup>12</sup>

15. Phase 2, as contemplated by the Board, unlike the process undertaken by the Applicant, would include a full and fair review of all aspects of the economic feasibility of the applied-for distribution facilities including all potential supply options including both LNG and CNG.
16. Several of the assertions made in support of the Motion were unsuccessfully raised as objections to Certarus' intervenor request in Phase 1 of the Application. These assertions included that Certarus' request for intervenor status was brought for the improper purpose of delaying and derailing the Project;<sup>13</sup> and that Certarus should have proposed to provide CNG as primary supply of the Project to the Municipalities at an earlier stage, and that its present application to intervene arose at an inappropriate stage of the process.<sup>14</sup> These issues were addressed early in the Phase 1 process, in which Certarus affirmed that it has never expressed interest in constructing and operating distribution facilities and that its intentions were to ensure open access – not to impair the Application for approval of the gas distribution facilities.<sup>15</sup>
17. The issue of Indigenous consultation at Certarus' Red Rock CNG Terminal was also raised early in Phase 1, notwithstanding that the Application made clear that upstream facilities were outside the scope of the Application,<sup>16</sup> and that Certarus had identified its ability to source CNG from its terminals in both Timmins and Red Rock.<sup>17</sup>
18. Certarus filed its application to intervene on September 26, 2020.<sup>18</sup> On September 30, 2019, the RRIB filed its own application to intervene and introduced the contention that Certarus had not consulted regarding the location of Certarus' Red Rock CNG Facility on its traditional lands.<sup>19</sup> RRIB did not object to Certarus' application to intervene.
19. On October 3, 2019, Marathon and NLNG filed objections to Certarus' application to intervene.<sup>20</sup> Certarus addressed those objections and attempted to justify its intervention in the Proceeding in its October 11, 2019 reply.<sup>21</sup> As neither Marathon nor NLNG raised the issue of

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<sup>12</sup> Decision at page 5.

<sup>13</sup> RRIB and BNA Submissions on Motion at paras 4 and 18; Corporation of the Town of Marathon, Objection to Certarus Application to Intervene (October 3, 2019) at paras 16-20.

<sup>14</sup> RRIB and BNA Submissions on Motion at para 6; Corporation of the Town of Marathon, Objection to Certarus Application to Intervene (October 3, 2019), Board File No. 2018-0329 at page 3; Nipigon LNG Corporation, Objection to Certarus Application to Intervene (October 3, 2019), Board File No. 2018-0329 at paras 26, 29-30.

<sup>15</sup> Certarus Response to Objection to Application to Intervene (October 11, 2019) at paras 3-18.

<sup>16</sup> Marathon Application at Exhibit A, Tab 2, Schedule 1, Page 2 of 4, "Figure 2".

<sup>17</sup> Certarus Application to Intervene, EB-2018-0329 (September 26, 2019) at para 2.

<sup>18</sup> Certarus Application to Intervene, EB-2018-0329 (September 26, 2019).

<sup>19</sup> Red Rock Indian Band, Request for Intervention, EB-2018-0329 (September 27, 2019).

<sup>20</sup> See Corporation of the Town of Marathon, Objection to Certarus Application to Intervene, EB-2018-0329 (October 3, 2019) and Nipigon LNG Corporation, Objection to Certarus Application to Intervene (October 3, 2019).

<sup>21</sup> Certarus Response to Objection to Application to Intervene (October 11, 2019).

Indigenous consultation in their objections, the issue was not addressed in Certarus' October 11, 2019 reply.

20. For its part, BNA requested intervenor status on October 11, 2019, the same day Certarus responded to the objections of Marathon and NLNG to its application to intervene.<sup>22</sup>
21. Based on these and other intervenor submissions, the OEB determined on October 30, 2019 that Certarus could intervene on a limited basis, stating that "(t)he OEB would be assisted by consideration of possible alternatives for the proposed gas supply plan and gas supply contract".<sup>23</sup> Certarus restricted its intervention accordingly.
22. In commenting on gas supply, amongst other things, Certarus drew attention to the fact that, while key aspects of the Application were being drafted, in fact, CNG had been a commercial supply option in Northern Ontario.<sup>24</sup> Certarus also identified the fact that the Timmins facility alone, which existed at all relevant times, could immediately supply the full near term (1,031 GJ/d in 2020) and long term needs (3,693 GJ/d in 2030) of the proposed distribution system.<sup>25</sup> As a result, whether the Red Rock CNG Terminal was available or not does not alter the basic facts available to the OEB in making its decision.
23. Moreover, the Certificate sought in EB-2018-0329 relates only to the Applicant's proposed distribution facilities, which Certarus supported as a potential market for CNG.<sup>26</sup> As presented in the Application and emphasized by NLNG,<sup>27</sup> the Board accepted that "the upstream elements, including the construction and operation of the LNG Facility, the trucking of LNG and the construction of LNG Depots, are not part of the Application."<sup>28</sup>
24. The fact Certarus did not address the upstream Indigenous consultation allegations raised by RRIB is consistent with the limited scope of intervention in which Certarus was permitted to engage; the fact the Timmins CNG supply option alone was ample for the Municipalities needs; and the fact that matters relating to upstream supply facilities were beyond the scope of the Application.
25. As noted by the Board, the Phase 1 Decision also does not decide final rights with respect to the GSP, the leave to construct ("LTC"), or the request for approval of a long term contract.<sup>29</sup> In effect, the Decision is an interlocutory ruling, inviting the Applicant to file, as part of the

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<sup>22</sup> Bingwi Neyaashi Anishinaabek First Nation, Request for Late Intervention, EB-2018-0329 (October 11, 2019).

<sup>23</sup> Ontario Energy Board, Procedural Order No. 2, EB-2018-0329 (October 30, 2019) at page 3. BNA requested intervenor status on the basis that its interests are impacted in a manner similar to RRIB on October 11, 2019, the same day Certarus responded to the objections of Marathon and NLNG to its application to intervene.

<sup>24</sup> Certarus Ltd., Final Submission, EB-2018-0329 (January 6, 2020) at paras 38-39 and 45.

<sup>25</sup> Certarus Ltd., Final Submission, EB-2018-0329 (January 6, 2020) at paras 45 and 52; see also Certarus Response to Objection to Application to Intervene (October 11, 2019) at para 14.

<sup>26</sup> Certarus Response to Objection to Application to Intervene (October 11, 2019) at paras 3-6; Certarus Ltd., Final Submission, EB-2018-0329 (January 6, 2020) at paras 10-12.

<sup>27</sup> Nipigon LNG Corporation, Response Regarding Procedural Order No. 1, EB-2018-0329 (October 11, 2019) at paras 4-5 and PDF page 25, attaching an excerpt from the Marathon Application at Exhibit A, Tab 2, Schedule 1, Page 2 of 4, "Figure 2".

<sup>28</sup> As noted by the Board at page 1 of the Decision.

<sup>29</sup> EB-2020-0107 Procedural Order No. 1 at page 3.

Phase 2 process, additional evidence to cure deficiencies the Board identified in the Phase 1 Decision.

26. The same conclusion applies to outstanding Indigenous consultation issues, provided they are relevant. In response to the Letter of Comment filed on behalf of Wahkohtowin Development GP Inc. alleging inadequate consultation, the Board made clear that its Phase 1 Decision was not final and that any disputed Indigenous consultation issues relevant to the Application before it should be raised in the context of Phase 2:

The Decision did not grant leave to construct the Project, and the OEB did not make any final findings with respect to the adequacy of Indigenous consultation. To the extent that Wahkohtowin (or the First Nations that it represents) wishes to intervene and make submissions with respect to the Indigenous consultation issue, it may do so through Phase 2 of this proceeding.

...

The OEB reminds Wahkohtowin that the application before the OEB is for leave to construct natural gas pipeline networks in five communities, and related approvals. The OEB can only consider Wahkohtowin's concerns to the extent they are within the scope of the proceeding. Wahkohtowin should therefore clearly explain its interest in the proceeding in its letter of intervention.<sup>30</sup>

## II. SUBMISSIONS

### A. Legitimate Expectations and Procedural Fairness

27. Certarus respectfully submits that the submissions regarding legitimate expectations and procedural fairness are plainly rebutted on the facts. Any delay in receipt of final approvals results, at least in part from the Applicant's own request for a 2-phase approval process. Delays also arise from the Board's inherent discretion to identify material deficiencies in any application that comes before it and to issue orders in the public interest affording an applicant a fair opportunity to cure those deficiencies.<sup>31</sup>
28. The "legitimate expectations" doctrine is procedural only: it cannot dictate a particular substantive outcome from the exercise of the Board's discretion.<sup>32</sup> Rather, it relates to the procedural fairness of the process employed by the Board. As noted by the Supreme Court of Canada, "the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain."<sup>33</sup>

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<sup>30</sup> Ontario Energy Board, Letter to Wahkohtowin Development GP Inc. (February 28, 2020), EB-2018-0329 at pages 1-2.

<sup>31</sup> Anwaatin Inc., Submissions on Motion to Review, EB-2020-0107 (April 17, 2020) at page 1.

<sup>32</sup> *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 at para 26.

<sup>33</sup> *Ibid.*

29. Here, parties opposite seek to ordain a particular outcome by restricting the exercise of the Board's broad discretion in the public interest to consider alternatives to the proposal placed before it in the Application.
30. The Board itself highlighted the breadth of the "public interest" considerations it is obliged to consider.<sup>34</sup> Clearly, the Board operates well within its statutory mandate when it invites evidence to be filed in Phase 2 in the public interest considering potentially lesser cost, more reliable, less commercially risky, more geographically diverse supply options to those initially proposed.

Section 96 of the OEB Act states that the OEB shall make an order approving leave to construct if it is of the opinion that the project is in the public interest. "Public interest" is not defined by the OEB Act; however the OEB is guided by its statutory objectives in relation to gas, which are:

1. To facilitate competition in the sale of gas to users;
2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service;
3. To facilitate rational expansion of transmission and distribution systems;
4. To facilitate rational development and safe operation of gas storage;
5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
- 5.1. To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas; and
6. To promote communication within the gas industry and the education of consumers.<sup>35</sup>

31. The public interest is of particular concern where the Board itself expressed serious concerns about the unbalanced nature of the contractual arrangements concluded between the LNG supplier and the municipalities.<sup>36</sup> In the Decision, the OEB agrees with many of the concerns raised by the parties that the proposed Contract as currently drafted does not appear to provide a balanced treatment of the risks, or to be in the best interest of customers:

As OEB staff and SEC observed, the Contract appears designed to protect NLNG from risk, and much less so to protect the Utility and therefore its ratepayers.<sup>37</sup>

32. In addition, parties cannot allege that the procedural delay in the present proceeding is due to the Board's Direction alone. Rather, as noted above, a two-phased process was always

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<sup>34</sup> Decision at page 5.

<sup>35</sup> Decision at page 5.

<sup>36</sup> Decision at pages 27-28.

<sup>37</sup> Decision at page 27.



contemplated to allow critical information regarding the Utility's technical and financial capability be provided in the second stage.<sup>38</sup> The fact that further evidence regarding economic feasibility and Indigenous consultation also must be included in Phase 2 arises from other issues with the Application itself; not from the presence of any of Certarus' CNG supply terminals.

33. Rather than representing a denial of procedural fairness, the Direction ensures all parties have a full and fair opportunity to address the issues the Board considers relevant. The proceeding is ongoing; it has not been completed.
34. That fact, by itself, however, exposes the true, substantive purpose of the Motion – which is to prevent the Board from even considering the CNG alternative it considers relevant as part of the broader public interest; an alternative deliberately excluded by NLNG and the Applicant from the outset.
35. Moreover, contrary to Anwaatin's submission, the Board's Direction fully assures consistency with ending "energy poverty" and providing "... access to affordable, reliable, sustainable and modern energy"<sup>39</sup> since it requires consideration of a potentially less costly, less commercially risky, reliable and sustainable CNG gas supply alternative which is already being enjoyed by new gas consumers elsewhere in Northern Ontario.
36. Respectfully, the fact the Board has provided a full and fair opportunity to the Applicant to address deficiencies and shortcomings identified in the Application is the antithesis of procedural unfairness.
37. Parties have no legitimate expectation that the Board would deliberately blinker its review of any Application to simply accept whatever the Applicant proposes. Accordingly, in light of the foregoing, the Board's Direction cannot be viewed as a breach of legitimate expectations and procedural fairness in the present (ongoing) proceeding.

## **B. Adequacy of Indigenous Consultation Relevant to the Project**

38. The Board has already determined that relevant Indigenous consultation issues should be raised in Phase 2.<sup>40</sup> Should the Board consider it relevant, other legitimate Indigenous consultation issues could be considered in Phase 2 as well.
39. Respectfully, additional consideration and fact-finding during the Phase 2 process would be fairer and more appropriate than peremptorily dismissing the CNG supply alternative, as the Movants suggest. Moreover, fairness dictates that disputed allegations of fact – if relevant - be tested for their accuracy.

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<sup>38</sup> Decision at page 2.

<sup>39</sup> Anwaatin Inc., Submissions on Motion to Review, EB-2020-0107 (April 17, 2020) at page 2.

<sup>40</sup> Decision at pages 3, 11-12.



40. Furthermore, RRIB, BNA and Certarus interventions were all considered by the Board at the outset of Proceeding EB-2018-0329. While various assertions were set forth in their individual intervenor requests and in the submissions made opposing Certarus, as noted above the Board limited the issues that Certarus was permitted to pursue to discussion of "...possible alternatives for the proposed gas supply plan and gas supply contract".<sup>41</sup> Certarus limited its activity to that restricted scope of intervention and made clear that it did not object to the approval of the gas distribution facilities provided CNG interconnection facilities were also included.<sup>42</sup>
41. The fact there has been a bare assertion of inadequate consultation "prior to the erection of Certarus' CNG facility",<sup>43</sup> raised at the outset of the Proceeding, does not warrant variance of the Phase 1 Decision when other Indigenous consultation issues, to the extent relevant, have been deferred to Phase 2 for consideration.<sup>44</sup>
42. In its response to the Wahkohtowin Development GP letter discussed above, the Board requested the submission of information detailing the interests the First Nations consider relevant to the actual Application before the Board. The scope of the Application before the Board in terms of relevant Indigenous consultation, therefore, requires clarification should the Board direct parties to file related evidence in Phase 2.

### **C. Relevance of Upstream Facilities Issues**

43. Importantly, neither Certarus' existing Red Rock CNG Terminal nor the proposed Nipigon LNG facilities form part of the Application before the Board. For that reason, and given the limits to its intervention permitted by the Board at the outset, Certarus refrained from pursuing those upstream facilities issues in Phase 1.
44. As noted above, NLNG itself highlighted to the Board the "narrow scope of the Application" and pointed out that matters related to upstream gas supply facilities were beyond the scope of the proceeding.<sup>45</sup>
45. This critical admission raises serious concerns about the relevance of the Motion given it is premised upon upstream facilities matters beyond the scope of the present proceeding. For these reasons alone, the Motion should be denied.

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<sup>41</sup> Ontario Energy Board, Procedural Order No. 2, EB-2018-0329 (October 30, 2019) at page 3.

<sup>42</sup> Certarus Ltd., Final Submissions, EB-2018-0329 (January 6, 2020) at paras 10, 13, 15-16; Certarus Ltd., Response to Objections, EB-2018-0329 (October 11, 2019) at para 5.

<sup>43</sup> RRIB and BNA Submissions on Motion at para 24.

<sup>44</sup> Decision at pages 3, 11-12.

<sup>45</sup> Nipigon LNG Corporation, Response regarding Procedural Order No. 1, EB-2018-0329 (October 11, 2019) at paras 4-5 and PDF page 25, attaching an excerpt from the Marathon Application at Exhibit A, Tab 2, Schedule 1, Page 2 of 4, "Figure 2".

**D. Evidence**

46. In its submission supporting the Motion, NLNG raises a new issue regarding the "evidence" which the Board may legitimately consider in reaching its Phase 1 Decision.<sup>46</sup>
47. With respect, NLNG's argument is overly formalistic and should be rejected. Even if it were valid, there are at least two reasons why, logically, it should fail.
48. First, since the issue of evidence was not raised in the Motion itself and NLNG did not file its own motion, this aspect of NLNG's submission is beyond the scope of the Motion and should be disregarded.
49. Second, if NLNG's position is accepted literally, the factual premise of the Motion fails and with it so must the Motion. RRIB provides only a bare assertion regarding pre-construction consultation of upstream facilities which is not supported by the evidentiary formalities NLNG now insists upon. If NLNG requires the Board to ignore all such claims or assertions on the present record unsupported by affidavits and the like, so too must the Board dismiss the factual premise RRIB alleges as part of the Motion.
50. More fundamentally, as the Board is well aware, the strict rules of evidence do not apply to proceedings such as these. The Board is master of its own process and possesses expertise in the area of energy supply and gas distribution which allows it to assess the representations of parties and Applicant in assigning the weight to be accorded to any of those representations. Rather than limit the ability to test the "evidence", the impugned Direction provides a full and fair opportunity to do just that.
51. Ample evidence and argument on the record came from parties other than the Applicant. For example, NLNG itself filed several Certarus news releases on the record in its arguments.<sup>47</sup> In its Final Submission, NLNG provided new evidence on the record "to put the New England case in context".<sup>48</sup>
52. In any case, much of the evidence cited by Certarus in its challenge of the GSP and gas supply contract was evidence that was also confirmed by the Applicant. For example, it was Marathon that stated that "the gas supply and distribution project [...] that underpins the North Shore LNG Project Application [...] was conceived and initiated as a Liquefied Natural Gas [...] project".<sup>49</sup> Further, in response to Certarus' questioning the depth of the consideration of CNG, Marathon confirmed that Elenchus was instructed by the Corporation that the plan should be premised on a project supplied only by LNG,<sup>50</sup> despite the fact Elenchus' original scope of

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<sup>46</sup> Nipigon LNG Corporation, Submission re: Motion to Review, EB-2020-0107 (April 17, 2020) at paras 20-22.

<sup>47</sup> Nipigon LNG Corporation, Final Submission, EB-2018-0329 (January 6, 2020) at Tab 8 (PDF page 142).

<sup>48</sup> Nipigon LNG Corporation, Final Submission, EB-2018-0329 (January 6, 2020) at paras 52-53, also at TAB 5 (PDF pages 114-120).

<sup>49</sup> Corporation of the Town of Marathon, Objection to Certarus' Application to Intervene (October 3, 2019) at page 2.

<sup>50</sup> Corporation of the Town of Marathon, Response to Certarus Ltd Interrogatory 4 (a) and (b), EB-2018-0329 (November 26, 2019) at page 7 of 24.

work proposed including CNG.<sup>51</sup> Certarus' argument that Marathon's estimated costs for CNG are without basis is made based on the information provided – or not provided – by Marathon.<sup>52</sup>

53. In any case, no final decisions were reached in the Phase 1 Decision; rather an expansion of the evidentiary record was directed.<sup>53</sup> In that respect, the Board's Direction answers NLNG's concern, since it directs completion of the evidentiary record in Phase 2 of the proceeding.
54. Regardless, the Board Direction targeted by the Motion arose because the Board found the Application itself to be deficient and expressed serious concerns about the extent to which ratepayers interests were protected:

The OEB agrees with many of the concerns raised by the parties that the proposed Contract as currently drafted does not appear to provide a balanced treatment of the risks, or to be in the best interest of customers.<sup>54</sup>

55. Respectfully, these are not grounds to strike the Board's Direction that further evidence was required to be filed in Phase 2. Rather, NLNG's concerns about the adequacy of the evidence are answered by the Phase 1 Decision and the requirement for further evidence to be filed to complete the record in Phase 2. Only then would it be possible to make final decisions based on a complete record addressing all the issues the Board, acting in the broader public interest, considered relevant.
56. For its part, Certarus requested the same opportunity:

Certarus would welcome the opportunity to provide the Board, should it so require, additional detailed information on how it is in a position to provide the Municipalities and the Utility with either a) a competitive gas supply service on a tolling basis, or b) delivered natural gas sales directly into the Distribution System.<sup>55</sup>

57. Should the Motion be granted, Certarus would be denied procedural fairness in presenting its case at the Phase 2 proceeding.

#### **E. CNG Option Not Dependent on Red Rock CNG Terminal**

58. The Motion appears to be premised on the assumption that a CNG supply option would not exist since, in the RRIB's view, the Red Rock CNG Terminal may not be available to supply the municipalities.<sup>56</sup>

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<sup>51</sup> Corporation of the Town of Marathon, Response to Certarus Interrogatory 4(c), Attachment A, at page A-3 (PDF pages 37-38 of 41).

<sup>52</sup> Corporation of the Town of Marathon, Response to OEB Staff Interrogatory 11(a) and Attachment A.

<sup>53</sup> EB-2020-0107 Procedural Order No. 1 at page 3.

<sup>54</sup> Decision at page 27.

<sup>55</sup> Certarus Ltd., Final Submissions (January 6, 2020) at para 58.

<sup>56</sup> Motion at para 18; RRIB and BNA Submissions on Motion at paras 24 and 27.

59. In fact, as noted above, each of Certarus' CNG hubs has physical capacity which far exceeds the near term and longer term needs of the municipalities.<sup>57</sup> The Board was aware of that fact when it granted Certarus the right to intervene in the proceeding.
60. During the course of the proceeding the Applicant conceded that it understood as far back as November 21, 2017 that the Timmins CNG Terminal was in the final stages of permitting and that Certarus "...was investigating a second terminal in either Hearst or Thunder Bay".<sup>58</sup> The record demonstrates, therefore, that the CNG option still exists even if the Red Rock CNG Terminal was not available.<sup>59</sup> The alleged error of fact, even if true, would not eliminate the CNG supply option available elsewhere.
61. Accordingly, there is no basis to vary the Direction to file evidence in relation to a CNG option in Phase 2. The grounds for the threshold question pursuant to Rule 43.01, therefore, have not been established.
62. In this regard, Certarus was surprised to see Marathon's April 17, 2020 suggestion that "based on more recent communications with Certarus, it is not clear to the Municipalities that Certarus' new CNG facility near Nipigon, Ontario has sufficient capacity to serve the needs of the Municipalities".<sup>60</sup>
63. While some communication between the Municipalities and Certarus did occur immediately following release of the Phase 1 Decision (on February 27, 2020) and prior the filing of the Motion on March 18, 2020, Certarus never suggested any capacity limitations of any kind from either its Red Rock or Timmins hubs that would impair its ability to supply the near term or long term needs of the Municipalities.
64. In fact, in its communication to Marathon on February 28, 2020 Certarus specifically confirmed that the Red Rock and Timmins CNG terminals continue to have a combined capacity, which far exceeds the expected near term and long term supply needs of the Municipalities.
65. As discussed below, on April 29, 2020 Certarus received an invitation from Marathon to submit a Request for Proposal to supply natural gas to the Municipalities, and looks forward to the opportunity to present the Municipalities with a full picture of its capacity through that process.

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<sup>57</sup> Certarus Ltd., Response to Objections to Application to Intervene, EB-2018-0329 (October 11, 2019) at para 14.

<sup>58</sup> Corporation of the Town of Marathon, Response to Certarus Interrogatory at Foreword (PDF page 1). The construction of new CNG facilities was also contemplated in the Application itself, though Certarus rejects the Application's assumption that the Utility would be required to build and operate a CNG compression facility near Nipigon: see Application, Exhibit A, Tab 13, Schedule 1, Page 12 of 17 (PDF page 274).

<sup>59</sup> A summary of Certarus Ltd.'s available CNG options was filed with the Board in EB-2019-0255 on January 31, 2020.

<sup>60</sup> Corporation of the Town of Marathon, Letter in Support of Motion, EB-2020-0107 (April 17, 2020) at page 2.

**F. Certarus Conducted Extensive Consultations with RRIB Prior to Construction of the Red Rock CNG Terminal**

66. In responding to a Motion relating to errors of fact on the face of the Phase 1 record, Certarus is uncertain the extent to which it is able to refer to evidence not part of (and arguably irrelevant to) that record.
67. In that regard, Certarus notes the Movants have referred to materials filed in unrelated proceedings,<sup>61</sup> and have expanded on the nature of their interest in the proceeding which now appears relate to, amongst other things, potentially lost opportunities to do business with NLNG and the interests of "...off-reserve members who are or may in the future reside in the Municipalities."<sup>62</sup>
68. For these reasons, Certarus requests the Board's indulgence to allow it to briefly defend its reputation from the unfair and inaccurate accusations contained in the Motion and in the Movants Submissions.
69. Certarus strongly disputes any suggestion that it did not consult with the duly authorized representatives of the RRIB "prior to the erection of Certarus' CNG facility".<sup>63</sup> In fact, Certarus enjoyed a direct and constructive relationship with the RRIB's duly authorized representatives throughout the planning, development and construction of its Red Rock CNG Terminal. Moreover, Certarus went to considerable effort to accommodate their recommendations.
70. What is disappointing is that the RRIB and BNA would even suggest that Certarus failed to consult with RRIB throughout that process. Certarus' relationship with the RRIB began in 2018 with meetings with then-Chief Matthew Dupuis and Councilors in September 2018 and included a site visit to the Red Rock CNG Terminal prior to construction by RRIB staff in May 2019 and the engagement of a RRIB joint venture for clearing activities, and periodic visits by RRIB staff during the course of the terminal's construction.
71. To Certarus, the only potential explanation is that the new RRIB leadership itself may not have been involved in those prior consultations. Certarus notes the current Chief and Council assumed their responsibilities after the RRIB election, which was immediately prior to the time that construction on the Red Rock Terminal was completed. Notwithstanding, that fact cannot detract from the fact that constructive and mutually beneficial consultation with RRIB did take place prior to construction with duly authorized RRIB representatives.
72. Mindful of the limits to its ability to respond without providing more evidence and given Indigenous consultation will be considered – if relevant – in Phase 2, Certarus would simply indicate that it is prepared to provide that additional evidence about its prior good faith consultation with RRIB whenever and wherever the Board may permit.

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<sup>61</sup> Motion at para 11; RRIB and BNA Submissions on Motion at para 16.

<sup>62</sup> RRIB and BNA Submissions on Motion at para 23.

<sup>63</sup> RRIB and BNA Submissions on Motion at para 24.

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73. In terms of relevance to the present Motion, however, Certarus has already demonstrated that the threshold question must be answered in the negative and the Motion dismissed since even if the Red Rock CNG Terminal did not exist, a CNG alternative in Northern Ontario continues to exist
74. Moreover, the factual premise of the Motion – an alleged failure to consult regarding a potential upstream supply facility – is irrelevant and lies beyond the scope of the present proceedings.
75. Accordingly, there is no basis for varying the Phase 1 Decision.

### **G. Recent Developments**


76. Since the Motion was filed and the Board issued Procedural Order No. 1, on April 29, 2020 Certarus has received a Request for Proposal ("**RFP**") from the Town of Marathon regarding supply of CNG (or LNG) to the Municipalities. Submissions are due May 22, 2020.
77. On April 30<sup>th</sup>, Certarus confirmed its intention to participate and submit a proposal under the RFP in writing.

### **III. CONCLUSION**

78. On the basis of the foregoing, Certarus respectfully submits that the ground for a review have not been made out and that the Motion should be dismissed.
79. Should you have any questions, please do not hesitate to contact the undersigned.

Yours truly,

**BENNETT JONES LLP**

  
L. E. Smith

LES:SR/lk

cc: Clint Warkentin, Certarus Ltd.  
Parties in Proceeding EB-2020-0107  
Ritchie Murray, Ontario Energy Board  
Michael Millar, Ontario Energy Board